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March 31, 2010

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Submitted via e-mail

Re: Electronic Fund Transfers, Docket No. R-1343

Dear Ms. Johnson:

The Independent Community Bankers of America (ICBA)¹ appreciates the opportunity to comment on a proposed rule by the Board of Governors of the Federal Reserve System ("the Federal Reserve") amending Regulation E, which implements the Electronic Fund Transfers Act ("the EFTA"). This proposal clarifies certain aspects of the November Regulation E final rule, which limits the ability of banks to assess overdraft fees for paying automated teller machine (ATM) and one-time debit card transactions on consumer accounts, unless the consumer opts in, to the bank's overdraft coverage service.

Background

On Nov. 17, 2009, the Federal Reserve published final rules amending Regulation E. The final rule restricted banks from assessing overdraft fees to cover automated teller machine (ATM) and one-time debit card transactions on a consumer's account without their express consent or election to opt into such a

¹ *The Independent Community Bankers of America represents nearly 5,000 community financial institutions of all sizes and charter types throughout the United States and is dedicated exclusively to representing the interests of the community banking industry and the communities and customers we serve. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community financial institutions compete in an ever-changing marketplace.*

With nearly 5,000 members, representing more than 20,000 locations nationwide and employing over 300,000 Americans, ICBA members hold \$1 trillion in assets, \$800 billion in deposits, and \$700 billion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA's website at www.icba.org.

payment for those transactions. On March 1, the Federal Reserve published a proposed clarification to Regulation E to address certain aspects of the final rule.

ICBA Comments

The proposed clarification addresses three issues: the scope of the opt-in requirement, written confirmation, and fees related to outstanding negative balances and sustained balances.

ICBA's detailed comments on specific aspects of the proposed clarification follow.

Scope of the Opt-in Requirement

The final rule prohibits a bank from assessing a fee or charge on a consumer's account held at the bank for paying an ATM or one-time debit card transaction, unless the consumer opts in to the overdraft service. However, section 205.17(b)(4) includes an exception from the notice and opt-in requirements of section 205.17(b)(1) for banks with a policy and practice of declining authorization for such transactions when there is a reasonable belief that the consumer's account has insufficient funds at the time of the authorization request.

Many banks have questioned whether the exception would permit banks without debit card overdraft services to assess an overdraft fee without an opt-in from the consumer. The proposed clarification amends sections 205.17(b)(1), (b)(4), and the related commentary to explain that the fee prohibition of section 205.17(b)(1) applies to all banks, and that section 205.17(b)(4) exception provides relief only from the notice and disclosure requirements.

ICBA strongly supported the proposed exception in the January 2009 proposed rule which would have permitted a bank to assess overdraft fees, even if the consumer had not opted in, if the bank had a reasonable belief that there were sufficient funds available in the consumer's account at the time it authorized an ATM or one-time debit transaction. While ICBA strongly disagrees with the Federal Reserve's final position, that it is the bank's responsibility to close "the information gap" between the initiation of the payment (e.g. when a consumer writes a check) and when the bank posts that payment, we feel the proposed clarification will assist banks in complying with the final rule.

Written Confirmation

The Federal Reserve's proposed clarification also addresses written confirmation of imposed fees, stating that a bank may not assess any overdraft fees or charges on the consumer's account until the bank has sent the written confirmation.

ICBA commends the Federal Reserve for addressing operational and litigation risks by clarifying that banks can start assessing overdraft fees once the written confirmation is sent to the consumer, rather than when the consumer receives the written confirmation. This provides a bright line for bank compliance, while ensuring that the consumer receives the overdraft coverage service as soon as possible.

Fees Related To Outstanding Negative and Sustained Balances

Under the final rule, consumers who do not opt in may not be assessed any overdraft fees for paying ATM or one-time debit card transactions, including daily or sustained overdraft, negative balance, or similar fees or charges. While many banks charge the same per-item overdraft fee amount regardless of the amount of the consumer's negative balance, some banks impose tiered fees based on the amount of the consumer's outstanding negative balance at the end of the day. Additionally, some banks may charge fees for sustained negative balances.

The proposed clarification states that where the consumer's negative balance is attributable in whole or in part to a check, ACH or other transaction not subject to the fee prohibition, banks are not prohibited from assessing a daily or sustained overdraft, negative balance, or sustained fee, even if the negative balance is also attributable in part to an ATM or one-time debit card transaction.

ICBA commends the Federal Reserve for allowing sustained or negative balance fees in cases where the negative balance is partially (but not wholly) due to an ATM or one-time debit card transaction. However, ICBA strongly opposes this proposed provision as most community banks, and their core deposit processors do not currently have the capability to analyze negative balances based on transaction type. While many software vendors are preparing to incorporate this analysis into system upgrades, this capability will not be available by the July 1 compliance date. ICBA strongly urges the Federal Reserve to extend compliance for this provision by 180 – 270 days.

Again, ICBA appreciates the opportunity to comment on this proposed clarification. If you have any questions or would like additional information, please contact the undersigned by telephone at (202) 659-8111 or by e-mail at cary.whaley@icba.org.

Sincerely,

/s/

Cary Whaley
Vice President
Payments & Technology Policy

INDEPENDENT COMMUNITY BANKERS of AMERICA *The Nation's Voice for Community Banks®*

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